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No. 94-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

Of Counsel:
JOSEPH A. GOLDEN
President
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
2000 Town Center, Ste. 900
Southfield, MI 48075

JANETTE JOHNSON
Amicus Chairperson
3614 Fairmount Street
Suite 100
Dallas, TX 75219

MARY LEE LEAHY
Counsel of Record
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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MOTION OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

The National Employment Lawyers Association moves for leave to file the attached Brief *Amicus Curiae* in support of the Petitioner, Rosemary Rahn. Consent to the filing of said brief has been obtained from all parties.

The National Employment Lawyers Association, (hereinafter referred to as "NELA"), is an organization of Plaintiff's Employment Lawyers which consists of approximately 1800 members nationwide. One of the purposes of NELA is to protect and defend the interests of plaintiffs involved in employment disputes including employment discrimination suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983.

NELA is not a party to this suit. However, this case raises issues regarding the type of speech that is pro-

tected by the First Amendment to the United States Constitution under 42 U.S.C. Section 1983. NELA member attorneys represent dozens of plaintiffs similarly situated to Petitioner Rahn herein. As *Amicus Curiae*, NELA respectfully seeks to assist this Court in its understanding of the importance of the issues raised in this case, the consequences of the decision in this case on currently pending employment discrimination cases and the need for hearing by this Court.

In the attached Brief *Amicus Curiae* NELA seeks to demonstrate why this case should be heard by this Court on the following grounds: 1) the importance of the issues raised; 2) the importance of those issues to all public employees in this nation; 3) the inconsistent rulings among the Courts of Appeal.

For the foregoing reasons, this motion for leave to file the attached Brief *Amicus Curiae* should be granted.

Respectfully submitted,

Of Counsel:
JOSEPH A. GOLDEN
President
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
2000 Town Center, Ste. 900
Southfield, MI 48075

JANETTE JOHNSON
Amicus Chairperson
3614 Fairmount Street
Suite 100
Dallas, TX 75219

MARY LEE LEAHY
Counsel of Record
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411

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BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

The National Employment Lawyers Association (NELA) submits this Brief as *Amicus Curiae* contingent upon the granting of the foregoing motion for leave to file said Brief. The interest of the *Amicus Curiae* is stated in that motion.

ARGUMENT

Introduction

NELA adopts the facts as set forth in the Petition for Writ of Certiorari.

In *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968), this Court followed the usual approach in First Amendment cases: 1) all persons have the right to freedom of speech; 2) the State can limit that right

for a compelling state reason, 3) any limitations on freedom of speech must be drawn as narrowly as possible. This has become known as the *Pickering* balancing test.

It must be emphasized that this balancing test issue would not be before this Court if this Court grants the Petition because the Respondent did not argue at the District Court level that the Respondent had a compelling reason that justified limiting Plaintiff's speech. (Fn.7, Panel Opinion).

Thus, the issue in this case is whether Plaintiff's speech was protected by the First Amendment to the United States Constitution. In a two to one decision the Court of Appeals determined that the speech was not so protected.

It should also be noted there is little or no dispute as to the actual content of the speech for most of it was contained in a written press release.

I. This Case Merits Review By This Court Due To The Importance Of The Issues Raised And The Effect Upon Public Employees.

In June, 1968, public employees throughout this nation rejoiced, for this Court held the First Amendment protected a public employee's speech on matters of public concern. *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968).

On August 8, 1994, the Court of Appeals for the Sixth Circuit, in the two-to-one decision in this case, severely restricted public employees' rights to freedom of speech and, as importantly to *Amicus*, restricted the right of the public to know. The Court of Appeals believed "public concern" is the equivalent to whistle blowing, albeit a

narrow interpretation of whistle blowing, that only those public employees who speak out as whistle blowers exposing *criminal behavior* are entitled to First Amendment protection.

In 1989 Petitioner had worked at the polls supporting a tax levy that provided monies to the Daniel Drake Memorial Hospital (DDMH), a public health care facility caring for the indigent. After the passage of that levy the new administrator at DDMH made certain changes, all of which involved the use of taxpayer monies.

Petitioner then joined the Committee to Maintain and Improve Drake Hospital, became the Chair of the Committee, drafted a press release and held a press conference on behalf of the Committee. The press release was critical of certain acts of the new administration of the hospital—all acts of which implicated taxpayer dollars.

The Court of Appeals held the press release and Plaintiff's public comments were not protected by the First Amendment and, therefore, if Plaintiff were fired for her speech, that was not actionable under 42 U.S.C. Section 1983.

Amicus submits this decision flies directly against the holding in *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968).

In 1964 Marvin Pickering, a teacher at the Lockport, Illinois, high school, had written a letter to the local newspaper. That letter was highly critical of the school board's use of bond money in the building of a new high school. That letter was published by the newspaper.

Pickering wrote that the new track was not regulation distance despite the fact thousands of dollars had been spent on it. He criticized free lunches for high school

athletes, no doors on several classrooms, no sunlight in the plant room and no water in the first aid treatment room. The Supreme Court concluded:

> *The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposal and its subsequent allocation of financial resources between the schools educational and athletic programs.* It also charged the superintendent with attempting to prevent teachers in the district from opposing or criticizing the proposal bond issue. 391 U.S. at 566. (emphasis added).

This Court reversed the Board's dismissal of Marvin Pickering.

The *Pickering* case is directly on point with the facts in this case. Petitioner used a press release and a news conference to communicate with the public. Pickering wrote a letter to the newspaper and it was published. Bond levies had passed in both cases. The subject matter of the communications in both cases was the manner in which the public bond monies were being spent or going to be spent. This Court held Marvin Pickering's speech was of public concern and that he was entitled to First Amendment protection. Marvin Pickering did not raise criminal wrongdoing.

This Court's opinion in *Pickering* did not just deal with the rights of Marvin Pickering. It dealt with the public's interest in

> "having free and unhindered debate on matters of public importance—*the core value of the First Amendment*—" 391 U.S. at 573.
>
> *Teachers are, as a class, the members of a community most likely to have informed and definite opinion as to how funds allotted to the*

> *operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliation of dismissal.* 391 U.S. at 572. (emphasis added).

The Supreme Court concluded *free and open debate is vital to informed decision making by the electorate.* 391 U.S. at 571-572.

Amicus respectfully submits that if the holding of the Court of Appeals in this case were applied to Pickering's letter he would have lost for he did not expose criminal activity. But this Court had no problem holding the content of Pickering's letter was of public concern.

Public employees constitute a sizable portion of the work force in this nation. (1995 *Information Please Almanac*) Public employees are the very persons who know what is going on within government and how tax dollars are being spent. If those employees' First Amendment protection is limited to criminal whistle blowing communications, informed decision making by the electorate will be severely limited. The persons "most likely to have informed and definite opinion", 391 U.S. at 572, as to how public funds are allocated and spent will be silenced. The core value of the First Amendment, free and unhindered debate, will have been dealt a severe blow.

In *Connick v. Myers*, 461 U.S. 138, (1983), this Court exempted from the *Pickering* holding employee statements of a purely personal nature. This Court went on to hold:

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. 461 U.S. at 147-148.

Myers' actions concerning office policy dealt directly with the application of that policy to herself. This Court refused to constitutionalize an employee's personal grievance. That very limited holding should not now be used to turn every public comment by a public employee into a private grievance—unless it relates to criminal whistle blowing.

This Court in *Connick* was very careful to point out

> *We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.* "The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. *'Great secular causes, with smaller ones, are guarded.'* " United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 223, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967), quoting Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction. See Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); New York v. Ferber, ____ U.S. ____, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). 461 U.S. at 147. (emphasis added).

In this case Petitioner joined with others to form the Committee to Maintain and Improve Drake Hospital. That Committee's cause, whether viewed as a "great" cause or a "smaller" cause, had the purpose of trying to maintain the hospital and improve care at the hospital. This was a cause worthy of First Amendment protection.

In *Connick* this Court held that content, form and context of the statement must be considered. Therefore, examination of the issues in this case cannot avoid the fact that Plaintiff chaired the Committee and that the Committee was composed not only of employees but also of patients, patients' family members and local citizens. The Committee prepared and issued the press release. This can hardly be characterized as a personal grievance as described in *Connick*. Whether it is viewed as a greater or smaller cause it falls directly under the criteria for protection set forth in *Connick*. This case is also certainly distinguishable from the holding in *Connick* in terms of form and context.

The content of the Petitioner's speech itself is of public concern. While media coverage may not, in and of itself, demonstrate public concern, *Amicus* submits it is highly unlikely there would be media coverage if the subject matter were not of public concern. How who calls the press conference or delivers the press releases can affect the *Connick* test is beyond *Amicus'* understanding.

As the dissent in the Circuit Court noted the subject of health care and how it is delivered may very well be *the* public issue of the '90's. What could be of more public concern than whether tax dollars are to be used to care for patients directly at a public hospital or indirectly at private facilities? This relates directly to the current hot topic of privatization of government operation.

If Petitioner is silenced on these issues, so will be the thousands of other public employees involved in health care, education, welfare and social service. Those areas are of public concern today. And all of us, the American public, will be the losers if the Court of Appeals' decision in this case is allowed to stand, for free and open

debate on health care and other publicly funded programs will be seriously impaired.

The effect of the decision in this case is to effectively silence public employees living in the Sixth Circuit. The public is the big loser for the public will be cut off from full and open debate on public issues based upon factual information given by those with first hand knowledge. This Court should not permit that to happen.

II. This Case Merits Review By This Court To Resolve The Difference In Holdings By Different Courts Of Appeals.

The Circuit Court's decision in this case differs with the law in other Circuits. The Court of Appeals for the Seventh Circuit has had occasion to apply the *Pickering* principles of law not only in *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968), in which the right of public employees to associate with others for a cause was recognized, but also in numerous other cases.

In *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970), the Plaintiff, a policeman, criticized the police department's Internal Inspection Division (IID) on television saying:

> The IID is like a great big washing machine. Everything they put into it comes out clean. 429 F.2d at 902.

The Court of Appeals found those comments protected by the First Amendment to the United States Constitution.

And the Seventh Circuit Court of Appeals has continued to honor that precedent.

In *McGill v. Board of Ed. of Pekin Elementary Sch.*, 602 F.2d 774 (7th Cir. 1979), the Plaintiff, a teacher, had complained about school procedures and had discussed a

master collective bargaining agreement at school board meetings and with the faculty. The Court of Appeals found the Plaintiff's comments were of public concern.

In *Knapp v. Whitaker*, 759 F.2d 827 (7th Cir. 1985), the Plaintiff, a teacher, criticized the grievance procedures in the school district. Subsequently he lost a coaching assignment and was geographically transferred. The Court of Appeals held his speech was protected by the First Amendment.

In *Greenberg v. Kometko*, 811 F.2d 1057 (7th Cir. 1987), the plaintiff resigned from state employment at the Illinois Department of Children and Family Services after being transferred in retaliation for certain statements he had made in-house and to certain members of the public. Greenberg had attempted to inform his supervisors and certain members of the public that children's mental health, physical health and their very lives were being threatened. Greenberg said that in order to save money the Department was returning children to unfit families. The Court of Appeals characterized Greenberg's comments as "*designed to right injustices Greenberg saw in the handling of the office's primary responsibilities.*" 811 F.2d at 1062. (emphasis added). The Court of Appeals for the Seventh Circuit held Greenberg's comments were entitled to First Amendment protection.

Recognizing that First Amendment protection covered not only comments made to the public but also comments made internally on matters of public concern, *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410 (1979), the Court of Appeals in *Greenberg* said:

> Those comments described in the record attempted to show, for example, that court orders were being ignored, that children were being denied essential health care, and that, in order to save

> expenses, children were being returned to unfit families. 811 F.2d at 1062.

The Court of Appeals held Greenberg was attempting to improve the care of children in Illinois' child care system. His comments were protected by the First Amendment.

The Circuit Court's holding in this case also directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983). The Court of Appeals in *Rookard* held speech that dealt with waste of public monies was protected by the First Amendment.

Clearly neither the Court of Appeals for the Seventh Circuit nor the Court of Appeals for the Second Circuit has limited the First Amendment protection of public employees to criminal whistle blowing. But that is precisely what the Court of Appeals for the Sixth Circuit has done in this case. The chilling effect of the Court's ruling cannot be underestimated. Public employees in the Sixth Circuit will live in fear of discharge if they express *any opinion on any controversial subject* except criminal conduct. And *Amicus Curiae* submits that chilling effect will spill over into whistle blowing on criminal conduct. When in doubt as to whether the comments relate to criminal conduct, public employees in the Sixth Circuit will simply keep their mouths shut.

Amicus submits that public employees in Cincinnati, Detroit and Louisville must not have less rights under the First Amendment than public employees living in Chicago, Indianapolis, Hartford and New York City.

It is the particular province of this Court to insure that the rights guaranteed by the United States Constitution are uniform throughout the nation. This Court cannot allow this disparate treatment in the area of First Amendment rights to continue. First Amendment rights must be

accorded uniform protection. Therefore, this Court should grant the Petition to insure public employees have uniform First Amendment protection throughout the nation.

CONCLUSION

Amicus urges this Court to grant the Petition for Writ of Certiorari. The issue presented is not only of importance to public employees it is also of extreme importance to the nation's interest in full and open debate on public issues. *Amicus* further urges this Court to grant the Petition so as to end disparate treatment of public employees who live in different parts of the nation.

Respectfully submitted,

Of Counsel:
JOSEPH A. GOLDEN
President
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
2000 Town Center, Ste. 900
Southfield, MI 48075

JANETTE JOHNSON
Amicus Chairperson
3614 Fairmount Street
Suite 100
Dallas, TX 75219

MARY LEE LEAHY
Counsel of Record
LEAHY LAW OFFICES
308 East Canedy
Springfield, IL 62703-2202
(217) 522-4411